IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 22-08-2005

CORAM

THE HONOURABLE MR. JUSTICE P.K. MISRA
AND
THE HONOURABLE MR. JUSTICE N. KANNADASAN

O.S.A.NO.333 OF 2003

Ennore Port Limited,
New No.15 (Old No.8)
Kasturi Rangan Road,
Alwarpet, Chennai 18.
(Successor of Chennai Port Trust
with regard to the Ennore Port
Project) .. Appellant/ 4th Respondent

Vs.

1. Hindustan Construction Company Limited,
   Hincon House, LBS Marg,
   Vikroli (W),
   Mumbai 400 083.

2. Shri Jagman Singh,
   Retd. Engineer-in-Chief,
   (Haryana Irrigation Dept.)
   No.158, Sectior 27-A,
   Chandigarh 160 019.

3. Shri T. Janakaraj Thomas,
   Chief Engineer (Retd),
   Tuticorin Port Trust,
   No.15/8, NGO Colony,
   Second Main Road, Choolaimedu

4. Shri Dharam Vir
   Engineer-in-Chief (Retd.)
   U.P.P.W,.D.No.A.377, Indira Nagar,
   Lucknow - 226 106.

5. The Board of Trustees of
   the Port of Chennai,
   Rep. by its Chief Engineer,
   Chennai Port Trust.

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

6. Chief Engineer,
   Chennai Port Trust.

7. The Project Director,
   Ennore Port Project
   Chennai.

   5 to 7 having office at
   Centenary Buildings,
   Rajaji Salai, Chennai 1. .. Respondents/ Respondents 1 to 4/Petitioners 1 to 3

Appeal filed under Clause 15 of the Letters Patent and Order XXXVI Rule 1 of the O.S. Rules against the judgment and decree dated 28.3.2003 in O.P.No.269 of 2002.

For Appellant : Mr.R. Krishnamurthy
Senior Advocate for
Mr.T. Poornam

For Respondent-1 : Mr.G. Masilamani
Senior Advocate for
Mr.D. Balaraman for R1

Respondents 2,3,5to7: Sd- No Appearance
R4 Not Ready in Notice

- - -

J U D G M E N T

P.K. MISRA, J

The facts giving rise to the present appeal are as follows :-

The appellant Port Trust awarded a contract to the first respondent with reference to rock quarrying and transportation. The appellant retained a particular sum as liquidated damages on account of breach of contract by the first respondent by not supplying the rock within the stipulated time. This matter was considered by the Dispute Review Board which held that the Department was not justified in retaining the amount towards liquidated damages. Ultimately the dispute was referred to Arbitral Tribunal.

2. The contention of the first respondent was that the present appellant was not entitled to withhold any amount on account of delay in supply of rocks as no injury had been caused.

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

3. According to the case of the appellant, on account of delay in supply of rocks by the first respondent, they had delayed the award of work of C4 contract and they have suffered damages under different heads. Invoking clause 47.1 of the General Conditions of contract, amount was claimed on the basis of liquidated damages stipulated in Clauses 43.1 and 44.1 of the contract. Clause 47.1 of the General Conditions of contract is as follows :-

> "47.1 If the Contractor fails to comply with the Time for completion in accordance with Clause 48, for the whole of the Works or, if applicable, any Section within the relevant time prescribed by Clause 43, then the Contractor shall pay to the Employer the relevant sum stated in the Appendix to Tender as liquidated damages for such default and not as a penalty (which sum shall be the only monies due from the Contractor for such default) for every day or part of a day which shall elapse between the relevant Time for Completion and the date stated in a Taking-Over Certificate of the whole of the Works or the relevant Section, subject to the applicable limit stated in the Appendix to Tender. The Employer may, without prejudice to any other method of recovery, deduct the amount of such damages from any monies due or to become due to the Contractor. The payment or deduction of such damages shall not relieve the Contractor from his obligation to complete the Works, or from any other of his obligations and liabilities under the Contract."

4. According to the appellant, since there was delay in supply of materials as per the specific terms of the contract, the appellant was entitled to with-hold the amount by way of liquidated damages.

5. The Tribunal observed that as per Clause 604.1 of Technical Specification, it has been stated in sub-para 5 that the Placing in and removal from stock piles of rock of various grades shall be co-ordinated between contractors in the best possible manner. It was further held that as per Clause 604.4, the Contractor was required to co-ordinate in schedule for supply of rock of particular grades in order to prevent shortages of supply for construction. It was further observed :

> " (iv) They had been meeting the requirements of C-4 contract in terms of the recovery plan submitted in November 1997. The recovery plan also indicated amendments to Table 3 of C-1 contract that in the event they were to follow Table 3 of C-1 contract, it would have resulted in the stock out situation in C4 contract to the extent of 6 months in Grade "C" and the extent of

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

3 months in respect of Grade "D".

(v) That by virtue of the agreement of C-4 contract that the C-1 contractor would be given the flexibility to meet the C-4 Contractor's requirement, the provisions of C-1 contract stand modified to the above extent; that they had met with C4 requirement of different grades of rock without changing the total sectional requirement in each section of the work."

The Arbitral Tribunal categorically found :-

" 8.1. The Clause 47.1 of the agreement which prescribes levy of Liquidated damages on the failure of the Claimants to achieve gradewise and total supply of rocks as per Table-3 (page 153 of the Agreement) has to be interpreted in conjunction with:

(a) Clarification given in the questions/answers in pre-bid meeting held on 29th November 1995, that the Liquidated damages is compensation to the Employer for not being able to use the works from contractually agreed date. Actually the total rock supply was completed well in advance.

(b) Sub-clause 503.13 of Technical specification (page 329 of the agreement) provides for

i. Permissible variation in stockpile schedule accepted.

ii. Loss suffered by the Employer due to delay to the date of commissioning of the new port-which actually was not there due to advance completion of rock supply and hence inauguration of port in advance on 1st February 2001 as against the scheduled date of 26th April-2001.

(c) Sub-clauses 601.2, 604.1 and 604.4 of Technical Specifications of the contract permit claimants the flexibility in supply of rocks to meet the requirements of other Contractors for the construction of breakwaters and coastal protection works.

(d) It was actually the delay by the Respondents in award of ECPP/C4 contract due to revision of the North Breakwater alignment."

The Arbitral Tribunal further held that the extension having been given and the work having been completed within such period, no

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

amount is payable by the present Respondent No.1 as there is no injury to the Port Trust.

6. The Arbitral award was challenged under Section 34 of the Arbitration and Conciliation Act. The learned single Judge has negatived the contention of the appellant on the ground that there has been no loss caused to the appellant. The present appeal is directed against the decision of the learned single Judge.

7. Learned counsel appearing for the appellant has placed strong reliance on Section 74 of the Indian Contract Act and contended that in view of such specific provision, it was not necessary for the appellant to prove that any loss had been caused. Learned counsel has also placed strong reliance upon the decision of the Supreme Court reported in 2003 (2) CTC 282 (OIL & NATURAL GAS CORPORATION LTD., v. SAW PIPES LTD.). In the said case, the appellant Oil & Natural Gas Corporation, had engaged the respondent company in the business of supplying equipment for Offshore Oil exploration and maintenance. As per the terms and conditions the goods were required to be supplied on or before 14.11.1996. The respondent had requested for extension of 45 days time as he could not complete the contract beyond its control. The appellant by 4th December, 1996, extended time with a specific statement that the amount equivalent to liquidated damages for delay in supply of pipes would be recovered from the respondent. Thereafter the appellant made payment for the goods supplied by deducting certain amounts as liquidated damages. Ultimately the matter was referred to the Arbitral Tribunal. The Tribunal found that the reasons given by the supplier for delay were not tenable, yet the Arbitral Tribunal held it was for the appellant ONGC to establish that they had suffered any loss because of the breach committed by the respondent in not supplying the goods within the prescribed time limit and since no such loss could be proved by ONGC, the Tribunal held that ONGC had wrongfully with-held the amount. Challenge to such award having been failed before the High Court, the matter came to the Supreme Court in appeal. One of the contentions raised by the appellant was to the effect :

> " (1) the award is vitiated on the ground that there was delay on the part of respondent in supplying agreed goods/pipes and for the delay, appellant was entitled to recover agreed liquidated damages i.e. a sum equivalent to 1% of the contract price for whole unit per week of such delay or part thereof.
>
> (2) the award passed by the arbitrator is on the face of it illegal and erroneous as it arrived at the

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

conclusion that the appellant was required to prove the loss suffered by it before recovering the liquidated damages. He submitted that the arbitral tribunal misinterpreted the law on the subject;

(3) in any set of circumstances, the award passed by the arbitrator granting interest on the liquidated damages deducted by the appellant is, on the face of it, unjustified, unreasonable and against the specific terms of the contract, namely, clause 34.4. of the agreement, which provides that on 'disputed claim', no interest would be payable."

8. Learned counsel for the respondent in the said case had contended that for the breach of contract provisions of Section 74 of the Contract Act would be applicable and compensation/damages could be awarded only if the loss is suffered because of the breach of contract and it was further contended that the party claiming liquidated damages has to prove the loss suffered by him.

9. The Supreme Court after extracting the provisions contained in Sections 73 and 74 of the Contract Act, observed :-

"46. From the aforesaid Sections, it can be held that when a contract has been broken, the party who suffers by such breach is entitled to receive compensation for any loss which naturally arise in the usual course of things from such breach. These sections further contemplate that if parties knew when they made the contract that a particular loss is likely to result from such breach, they can agree for payment of such compensation. In such a case, there may not be any necessity of leading evidence for proving damages, unless the Court arrives at the conclusion that no loss is likely to occur because of such breach. Further, in case where Court arrives at the conclusion that the term contemplating damages is by way of penalty, the Court may grant reasonable compensation not exceeding the amount so named in the contract on proof of damages. However, when the terms of the contract are clear and unambiguous then its meaning is to be gathered only from the words used therein. In a case where agreement is executed by experts in the field, it would be difficult to hold that the intention of the parties was different from the language used therein. In such a case, it is for the party who contends that stipulated amount is not reasonable compensation, to prove the same."

It was further observed :-

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

" 64. It is apparent from the aforesaid reasoning recorded by the arbitral tribunal that it failed to consider Sections 73 and 74 of the Indian Contract Act and the ratio laid down in Fateh Chand's case (supra) wherein it is specifically held that jurisdiction of the Court to award compensation in case of breach of contract is unqualified except as to the maximum stipulated; and compensation has to be reasonable. Under Section 73, when a contract has been broken, the party who suffers by such breach is entitled to receive compensation for any loss caused to him which the parties knew when they made the contract to be likely to result from the breach of it. This Section is to be read with Section 74, which deals with penalty stipulated in the contract, inter alia (relevant for the present case) provides that when a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, the party complaining of breach is entitled, whether or not actual loss is proved to have been caused, thereby to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named. Section 74 emphasizes that in case of breach of contract, the party complaining of the breach is entitled to receive reasonable compensation whether or not actual loss is proved to have been caused by such breach. Therefore, the emphasis is on reasonable compensation. If the compensation named in the contract is by way of penalty, consideration would be different and the party is only entitled to reasonable compensation for the loss suffered. But if the compensation named in the contract for such breach is genuine pre-estimate of loss or such party is not required to lead evidence to prove actual loss suffered by him. Burden is on the other party to lead evidence for proving that no loss is likely to occur by such breach. Take for illustration: if the parties have agreed to purchase cotton bales and the same were only to be kept as a stock-in-trade. Such balers are not delivered on the due date and thereafter the bales are – delivered beyond the stipulated time, hence there is breach of the contract. Question which would arise for consideration is – whether by such breach party has suffered any loss. If the price of cotton bales fluctuated during that time, loss or gain could easily be proved. But if cotton bales are to be purchased for manufacturing yarn, consideration would be different."

(Emphasis added)

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

10. Learned counsel appearing for the first respondent has submitted that the aforesaid Supreme Court decision does not lay down any inexorable principle that in every breach of contract, the amount stipulated has to be paid even if the breach of contract has not resulted in any injury. It has been contended by him that in the present case there is a categorical finding by the arbitrator that no loss having been caused to the present appellant, no compensation is payable. It is his submission that only when a legal injury is caused, then, the person would be entitled to compensation as contemplated under Section 74 of the Contract Act. He has submitted that in view of the clear finding of the arbitrator that no legal injury had been caused, the question of paying of compensation does not arise merely because there was delay.

11. The scope of Sections 73 and 74 of the Contract Act has come up for discussion in many decisions of the Supreme Court as well as several High Courts. In FATEH CHAND v. BALKISHAN DASS (AIR 1963 SC 1405), it has been observed as follows :-

> "8. . . . The section is clearly an attempt to eliminate the somewhat elaborate refinements made under the English common law in distinguishing between stipulations providing for payment of liquidated damages and stipulations to the nature of penalty. Under the common law a genuine pre-estimate of damages by mutual agreement is regarded as a stipulation naming liquidated damages and binding between the parties: a stipulation in a contract in terrorem is a penalty and the Court refuses to enforce it, awarding to the aggrieved party only reasonable compensation. The Indian Legislature has sought to cut across the web of rules and presumptions under the English common law, by enacting a uniform principle applicable to all stipulations naming amounts to be paid in case of breach, and stipulations by way of penalty.
>
> ...
>
> 10. Section 74 of the Indian Contract deals with the measure of damages in two classes of cases (1) where the contract names a sum to be paid in case of breach and (ii) where the contract contains any other stipulation by way of penalty. We are in the present case not concerned to decide whether a contract containing a covenant of forfeiture of deposit for due performance of a contract falls within the first class. The measure of damages in the case of breach of a stipulation by way of penalty is by S.74 reasonable compensation not exceeding the penalty

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

stipulated for. In assessing damages the Court has, subject to the limit of the penalty stipulated, jurisdiction to award such compensation as it deems reasonable having regard to all the circumstances of the case. Jurisdiction of the Court to award compensation in case of breach of contract is unqualified except as to the maximum stipulated; but compensation has to be reasonable, and that imposes upon the Court duty to award compensation according to settled principles. The section undoubtedly says that the aggrieved party is entitled to receive compensation from the party who has broken the contract whether or not actual damage or loss is proved to have been caused by the breach. Thereby it merely dispenses with proof of "actual loss or damage"; it does not justify the award of compensation when in consequence of the breach no legal injury at all has resulted because compensation for breach of control can be awarded to make good loss or damage which naturally arose in the usual course of things, or which the parties knew when they made the contract, to be likely to result from the breach." (Emphasis added)

12. Such decision was subsequently followed in AIR 1970 SC 1955 (MAULA BUX v. UNION OF INDIA). Similar principle had been laid down in 1973 SC 1098 (UNION OF INDIA v. RAMPUR DISTILLERY AND CHEMICAL CO. LTD.).

13. Referring to these decisions, a Division Bench of Kerala High Court in AIR 1982 Kerala 281 (STATE OF KERALA AND OTHERS v. M/s. UNITED SHIPPERS AND DREDGERS LTD.) observed :-

"18. That the party complaining of breach of contract and claiming compensation is entitled to succeed only on proof of "legal injury" having been suffered by him in the sense of some loss or damage having been sustained on account of such breach, is clear from Sections 73 and 75 of the Act. Sec.74 is only supplementary to Section 73 of the Act and it does not make any departure from the principle behind Section 73 in regard to this matter. . . . In a case where the party complaining of breach of the contract has not suffered legal injury in the sense of sustaining loss or damage, there is nothing to compensate him for; there is nothing to recompense, satisfy or make amends. Therefore, he will not be entitled to compensation. (Emphasis added)

14. Following the ratio of the decisions of the Supreme Court in AIR 1963 SC 1045 and AIR 1970 SC 1955 (cited supra), in AIR 1981 ORISSA 206 (STATE OF ORISSA AND OTHERS v. CALCUTTA

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

COMPANY LIMITED) a Division Bench of Orissa High Court, speaking through R.N. Misra, Chief Justice (as His Lordship then was), observed that in the absence of any legal injury, merely because there is violation of contract regarding supply of certain articles within the stipulated period, no compensation can be awarded in the absence of proof of extent of loss.

15. We are in respectful agreement with the views expressed in the decisions of the Kerala High Court and the Orissa High Court which in fact have only followed the various decisions of the Supreme Court in AIR 1963 SC 1405 (cited above) and other similar decisions.

16. As already indicated, in the present case, the arbitrator has found that breach of contract in supply of the materials beyond the stipulated period has not resulted in any loss to the appellant Port Trust and in the absence of any loss, the Port Trust is not entitled to retain any amount towards payment of compensation. In the decision cited by the appellant, the Supreme Court does not lay down that even where the breach of contract does not cause any legal injury, the principal is entitled to the liquidated damages. As a matter of fact,in paragraph 46 it has been observed :-

> "... In such a case, there may not be any necessity of leading evidence for proving damages, unless the Court arrives at the conclusion that no loss is likely to occur because of such breach."

17. From the aforesaid, it is obvious that where there is a clear finding that breach of contract did not result in any loss or "legal injury", compensation would not be payable. As a matter of fact, a bare reading of the factual scenario in 2003(2) CTC 282 (cited supra), clearly indicates that delay in delivery of articles had caused legal injury inasmuch as the entire project had been delayed. Legal injury was writ large because of the delay the project had been delayed, which is not so in the present case. The Division Bench of the Supreme Court in 2003(2) CTC 282 has purported to follow the ratio of the Constitutional Bench decision in AIR 1963 SC 1405. The said decision, which has been consistently followed, clearly indicates that only where legal injury is caused, the party suffering because of the breach of contract is entitled to compensation. The subsequent Supreme Court decision lays down, where there is a clear indication that the amount stated in the contract as liquidated damages clearly indicate the intention of the parties, such amount is payable in case of breach of contract resulting in legal injury and the party is not required to prove the extent of the loss.

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

18. In our opinion, the subsequent decision of the Supreme Court in 2003 (2) CTC 282 (cited supra) did not purport to depart from the consistent view taken by the Supreme Court in AIR 1963 SC 1405, AIR 1970 SC 1955 and AIR 1973 SC 1098 (cited supra). Since in the said decision, legal injury had been caused, the Supreme Court had observed that the amount stipulated in the contract represented a fair estimate of the loss, and, therefore, such amount was payable by the party who had caused breach of the contract.

19. In the light of the principle laid down in these decisions, the matter is to be examined. Assuming that there was delay on the part of the first respondent in the supply of materials which could be construed as a breach of contract, as per the materials available on record, the Contractor cannot be held responsible for such delay in the supply of materials. In this connection, it is useful to refer to sub-clauses 601.2, 604.1 and 604.4 of technical specifications of the contract agreement which permits the flexibility in supply of the rocks to meet the requirements of other contractors for the construction of breakwaters and coastal protection works and in terms of the said specifications only the first respondent has effected the supply of materials. If there is actually any delay on the part of the first respondent in violation of the above clauses, the appellant ought to have issued suitable directions to the first respondent by sending necessary communications. The fact remains that no such communications were ever sent. The very fact that the entire work was completed three months ahead of the period of contract would suggest that the appellant did not have any grievance whatsoever in the supply of materials.

20. As already indicated, in the present case, the arbitrator has categorically found that no legal injury had been caused. In the light of the categorical finding of the Arbitrator on facts, we do not propose to interfere with the said finding. It is settled law that the scope for interference in awards passed by the Arbitrator is limited and the Courts are not expected to reappraise the matter as if it is an appeal, as held by the Apex Court in its decision rendered in BHARAT COKING COAL LTD vs. L.K.AHUJA (2004 (5) SCC 109). It is not laid down in the Supreme Court decision in 2003(2) CTC 282 that even where no legal injury is caused, the party would be liable to pay compensation because of mere breach of a term of the contract. In our opinion, therefore, the arbitrator had rightly held that there was no justification for the present appellant to retain any sum.

21. In such view of the matter, we do not find any scope

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

to interfere with the award of the arbitrator as there is no error of law apparent on the face of record. Therefore, the order of the learned single Judge by making the award a rule of the Court is hereby confirmed and the appeal is dismissed. There would be no order as to costs.

dpk

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

To

The Sub Asst Registrar,
Original Side, High Court, Madras.

+ 1 cc to Mr.T.Poornam, Advocate SR No.35292

+ 1 cc to Mr.D.Balaraman, Advocate SR No.35262

JUDGMENT IN OSA.NO.333/2003

PSI(CO)
SR/24.8.2005

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/